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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1940.

No. 288

WALTER WILLIAMS,

*Petitioner,*

*against*

NATIONAL SURETY CORPORATION.

(ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT)

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**BRIEF FOR RESPONDENT IN OPPOSITION.**

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C. H. MOSES,

ROY H. CALLAHAN,

*Attorneys for Respondent.*

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OPINION BELOW. *Walter Williams v. National Surety Corporation* (R. 257 ; 110 F. (2d) 873).

DATE OF JUDGMENT. April 9, 1940 (R. 265). Petition for rehearing (R. 266), overruled (270), May 1, 1940.

NATURE OF THE CASE, RULINGS, ETC. Williams sued National on a Circuit Court judgment dated March 8, 1937 in the sum of \$8,253.46 against a former guardian, alleging National was liable under the terms of an agreement between National and the surety on the former guardian's bond (R. 1-4).

National denied any liability except as to \$155.75 (R. 29-36). The C. C. A. sustained National's position.

JURISDICTIONAL STATEMENT. The jurisdiction of this Court is invoked under Section 240(a).

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**BRIEF FOR RESPONDENT IN OPPOSITION.**

Respondent opposes the petition because:

1. No error was committed by the Circuit Court of Appeals.
2. The question decided by the Circuit Court of Appeals are not of such character as to furnish a basis for the granting of certiorari.

### A Short Statement of the Matter Involved.

Gordon Freeman as principal and National Surety Company (hereinafter called "Old Company") as surety executed a guardianship bond on February 19, 1927 (R. 5). National Surety Corporation (hereinafter called "National") came into existence on April 28, 1933 (R. 164-66) and on April 29, 1933 executed with the Old Company an agreement upon which this suit is predicated (R. 3). Under the terms of the agreement, National did not assume liability for losses "caused by acts committed prior to May 1, 1933" (R. 30, 169).

On November 8, 1937 the Circuit Court of Union County, Arkansas entered a surcharge judgment against Gordon Freeman, former guardian, for improper expenditures of \$8,253.46 (R. 49):

(a) \$155.75 for improper expenditures of estate funds subsequent to May 1, 1933 (R. 48-9, 103);<sup>1</sup>

(b) \$3,700.00 illegal loans made on February 7, 1928, May 10, 1929 and August 27, 1929 (R. 48-9, 80-103);

(c) \$4,791.71 illegal expenditures of estate funds between 1927 and April 29, 1933 (R. 48-9, 103).

On April 29, 1933 the Old Company failed and the Superintendent of Insurance of the State of New York took possession of it (R. 183). By statutory and court proceedings had on April 29-May 3, 1933 a Plan of Rehabilitation of the Old Company was adopted under which, on April 29, 1933 and May 1, 1933, the Superintendent of Insurance, under an agreement of April 29, 1933, for a valuable consideration sold and transferred certain of the assets of the Old Company to National in consideration of which (a) National assumed certain executory risks under some of

<sup>1</sup> Liability for this amount was admitted and is not in question or under consideration now.

the Old Company bonds, and (b) National transferred all of its capital stock to the Superintendent of Insurance for the benefit of Old Company creditors (R. 147-174), and upon the sale thereof the proceeds amounting to \$10,031,000 were distributed to the Old Company creditors.

The pertinent paragraph (III) of the agreement provided in part (R. 52):

"It is understood and agreed that the assumption of liability by the New Corporation under the provisions of paragraph 'II(c)' *ante*, is subject to the following exclusions and exceptions:

\* \* \* \* \*

"(c) Liability for losses arising from, or caused by, acts committed prior to May 1st, 1933 under fiduciary court bonds covering risks involving estates held or administered by persons or corporations acting in a fiduciary or trust capacity."

On or about November 16, 1937 this action was brought against National and on or about March 6, 1939 trial was completed, at which time the District Court (Judge Trimble) ruled that the organization of National, the transfer of property to it, and the agreement of April 29, 1933 were legal and valid but held (R. 59) that National had by the agreement of April 29, 1933 assumed liability for the losses totalled in the Union Circuit Court judgment (R. 47).

The Circuit Court of Appeals modified the District Court judgment and held National liable only for losses totalling \$155.75 which were caused by acts committed by the fiduciary subsequent to May 1, 1933, for which National previously had admitted liability.

### **Reasons Urged in Opposition to Writ of Certiorari.**

The Circuit Court of Appeals correctly decided that National did not assume liability for the losses caused by wrongful acts of the fiduciary prior to May 1, 1933. This conclusion is in accordance with the express language of



the agreement of April 29, 1933 quoted supra pp. 2, 3, and the holding of numerous courts which have had opportunity to interpret this clause.

*Standard Accident Ins. Co. v. Stewart*, 85 Pac. (2d) 277 (Okla. 1938);

*National Surety Corp. v. Ellison*, 88 F. (2d) 399 (C. C. A. 8, 1937);

*National Surety Corp. v. Laughlin*, 172 So. 490 (Miss. 1937);

*In the Matter of the Estate of Ettore Penna*, 250 A. D. 719 (1936), affirmed 274 N. Y. 600;

*First National Bank & Trust Co. v. National Surety Corp.*, 25 F. Supp. 392 (D. C. Minn., 1938).

Although the surcharge judgment recited the illegal expenditures between 1927 and April 30, 1933 as being a "balance in said guardian's hands as of June 10, 1933 of \$4,553.46 unaccounted for \* \* \* ", the record showed that this item consisted of illegal expenditures actually paid out by the fiduciary during the period prior to April 30, 1933. The actual dates of such expenditures are set forth in the record herein. The Circuit Court of Appeals correctly held that this standard form of recital was not an adjudication that the fiduciary on June 10, 1933 had in his possession such sums.

The agreement of April 29, 1933 is valid.

*Kenlon Coal Co. (Application of People, by Van Schaick)*, 239 A. D. 490, affirmed 264 N. Y. 473 (1933);

*National Surety Corp. v. Nantz*, 90 S. W. (2d) 385 (1936);

*Thrower v. Kistler*, 14 F. Supp. 217 (S. C. 1936).

See also *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (1934) which sustained a similar agreement.

**CONCLUSION.**

The decision below is in harmony with numerous decisions of other courts. There is no conflict of decision. The petition for writ of certiorari should be denied.

August 19, 1940.

C. H. MOSES,  
ROY H. CALLAHAN,  
*Attorneys for Respondent.*